

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Nancy Dubon (Respondent) applied for Industrial Disability Retirement (IDR) based on orthopedic (hips, knees, ankles and feet) conditions. By virtue of her employment as a Registered Nurse (RN) for Respondent Chuckawalla Valley State Prison, California Department of Corrections & Rehabilitation (Respondent CDCR), Respondent was a state safety member of CalPERS.

As part of CalPERS' review of Respondent's medical condition, Luke F. Bremner, M.D., a board-certified Orthopedic Surgeon, performed an Independent Medical Examination (IME) of Respondent on October 30, 2020. Dr. Bremner interviewed Respondent, reviewed her work history and job descriptions, obtained a history of her past and present complaints, and reviewed her medical records. Dr. Bremner opined that Respondent was not substantially incapacitated from the performance of her duties as an RN.

In order to be eligible for disability retirement, competent medical evidence must demonstrate that an individual is substantially incapacitated from performing the usual and customary duties of his or her position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

After reviewing all medical documentation and the IME reports, CalPERS determined that Respondent was not substantially incapacitated from performing the duties of her position. On December 11, 2020, Respondent was notified of CalPERS' denial of her IDR application, and she was advised of her appeal rights. Respondent appealed this determination and exercised her right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). OAH heard this matter remotely on July 26, 2022. Respondent represented herself at the hearing. Respondent CDCR did not appear at the hearing, and the matter proceeded as a default against Respondent CDCR, pursuant to Government Code section 11520 subdivision (a).

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support her case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

At the hearing, Dr. Bremner testified in a manner consistent with his examination of Respondent and his IME reports. He conducted an extensive review of Respondent's records, which included her disability application, job descriptions and medical records ranging from November 2018 to July 2020, and completed a physical examination.

Dr. Bremner reported that Respondent had equal bilateral strength in her lower extremities, no evidence of ankle problems, no evidence of tilt while walking, a normal gait, symmetric range of motion in both knees, and no pain with resisted hip flexion. Dr. Bremner opined that Respondent's subjective reports of pain were inconsistent with the objective results from examination.

Dr. Bremner testified that neither Respondent's hip and knee injuries would cause structural injuries, and his opinion was supported by imaging studies. Dr. Bremner found no objective support in Respondent's medical records to support any inability to perform her job. Dr. Bremner opined that Respondent had good recovery from her lateral stabilizing surgery with debridement. Based on medical research and his examination which demonstrated good objective strength and stability, Dr. Bremner stated there was no indication of the need for further imaging and/or treatment based simply on Respondent's subjective claims.

Dr. Bremner's review of additional MRIs showed no signs of internal derangement for Respondent's left knee and hip. Dr. Bremner testified that when a person is unbalanced, it can cause their joints to "asymmetrically wear out faster" in the knees. However, he found Respondent's range of motion in her knees was symmetrical. The only location in Respondent's left knee where palpable tenderness existed was in the anterior medial aspect, but even so, she had normal patellar tracking. Dr. Bremner's additional tests to assess the integrity of her knee ligaments (Lachman and posterior drawer) were both negative. Imaging showed no structural damage to the left knee, and no evidence of structural injuries to her hip. Dr. Bremner's medical opinion is that Respondent did not have an actual and present orthopedic condition that rises to the level of substantial incapacity to perform her usual job duties. Therefore, Dr. Bremner's competent medical opinion is that Respondent is not disabled.

Respondent testified on her own behalf that she had been a nurse since 1983 and really enjoyed her work. She fell at work in July 2018 while loading a patient into an ambulance, and she believes that is where her claimed orthopedic condition began. Despite that, Respondent delayed medical care until 2020 when she underwent left hip surgery. She indicated physical therapy did not work, she still has residual pain, and she cannot return to work because of the pain. She claims her pain is so excruciating that she has no quality of life; and cannot do anything except activities of daily living. She believes if she went back to work in her condition, she would compromise fellow employees or an inmate, and considers herself a danger due to her physical limitations.

Respondent submitted medical records from her treating physicians to support her appeal, but did not call any physicians or other medical professionals to testify. The medical records were admitted as administrative hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection is not sufficient to support a finding of fact unless it would be admissible over objection in civil actions. Administrative hearsay evidence can only be used to supplement or explain other evidence (Gov. Code § 11513 subd. (d).)

After considering all the evidence introduced, as well as arguments made by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of proof to establish by a preponderance of the evidence that her IDR application should be granted due to specified orthopedic conditions, and she did not meet her burden. The ALJ noted that Respondent's claims that she cannot perform her job safely or would pose a threat to others is purely speculative. Further, Respondent's fear of exacerbating her condition does not comply with CalPERS' disability standard. Respondent did not provide testimony from any medical expert to support her subjective claims of pain and instability. Finally, most of the reports that Respondent submitted were prepared in connection with her worker's compensation case, which uses a different standard for disability.

In contrast, the ALJ found that Dr. Bremner's credentials were impressive, and that he is a well-established expert in the fields of orthopedics and orthopedic surgery. Dr. Bremner's testimony showed Respondent had good objective strength and stability in her hips, ankles, knees, and feet, and her subjective complaints of pain and difficulty did not correspond to the objective findings during examination. The ALJ found competent medical opinion established by Dr. Bremner showed no instability, normal ranges of motion, and no structural abnormalities to indicate Respondent suffers from instability in any of her lower extremities.

The ALJ concluded that Respondent did not meet her burden to show that she is entitled to an industrial disability retirement, and therefore is not eligible to receive IDR benefits.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board.

November 16, 2022

Nhung Dao
Attorney